COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	)	**D.T.E. 04-33**

VERIZON MASSACHUSETTS'
MOTION FOR RELIEF FROM THE PROCEDURAL ORDER

Verizon Massachusetts ("Verizon MA") seeks relief, in part, from the Department's December 15, 2004, *Procedural Order* in this arbitration proceeding. Specifically, this Motion seeks relief from the Department's apparent requirement that Verizon MA continue to provide delisted unbundled network elements ("UNEs") to all competitive local exchange carriers ("CLECs") that the Department considers parties to the case – even those with interconnection agreements ("ICAs") that permit Verizon MA, with notice, to cease providing UNEs eliminated under federal law. *Procedural Order*, at 32-33.

As explained below, Verizon MA is entitled to implement the changes in its unbundling obligations arising from the *Triennial Review Order* and the D.C. Circuit's *USTA II* decision. Depending on the terms of a particular interconnection agreement, implementation can take two different forms. For some agreements, amendment is desirable to eliminate any doubt about Verizon's right to discontinue UNEs eliminated by *TRO* rulings that are in effect. Under those circumstances, arbitration is the procedural means prescribed by the Federal Communications

Commission ("FCC") in both its *Triennial Review Order* and *Interim Rules Order*[1] to *amend* those interconnection agreements - as required - to conform them to federal law. For other interconnection agreements, however, it is clear that *no amendment* is required because the express terms of those agreements already provide for the discontinuation of delisted UNEs after specified notice.

In its Notice of Withdrawal filed August 20, 2004, Verizon MA identified those CLECs with ICAs that already permit Verizon MA, upon notice, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Verizon MA exercised its contractual rights under those agreements and repriced the UNEs eliminated by the *Triennial Review Order* months ago.

For instance, as stated in its Notice of Withdrawal, Verizon provided CLECs 90-days advance written notice of discontinuation with respect to DS1 Enterprise Switching eliminated by the *Triennial Review Order* and 4-Line DS0 switching subject to the FCC's Four-Line Carve-Out Rule, which was reaffirmed in the *Triennial Review Order.* Verizon provided those notices to CLECs on May 18, 2004, for effect on August 22, 2004.[2] Verizon has not issued 90-day notices for the UNEs that were eliminated by the *USTA II* mandate (*i.e.*, mass-market switching, enterprise loops, and dedicated transport), but which are the subject of further FCC proceedings.

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[1] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, 19 FCC Rcd 16783 (rel. August 20, 2004) ("*Interim Rules Order*"). In its *Interim Rules Order*, the FCC stressed the need to ensure that interconnection agreements reflect changes in federal unbundling obligations. In this regard, the FCC expressly endorsed proceedings like this one to ensure a "speedy transition" to any permanent rules eliminating unbundling requirements for mass-market switching, high-capacity loops, and dedicated transport. *Interim Rules Order*, at ¶ 22.

[2] In the written notification to affected CLECs, Verizon informed them that, although their ICAs provided for the *discontinuation* of UNEs that are no longer required, Verizon would not disconnect any CLEC's service on account of these legal rulings. Instead, Verizon repriced those service offerings to match similar services (*e.g.*, resale for enterprise UNE-P), unless the CLEC either requested disconnection or negotiated a commercial replacement for the delisted UNEs. Verizon took this step to prevent any CLEC end-user customer from losing service.

In its *Procedural Order*, the Department properly permitted Verizon MA to withdraw its Petition for Arbitration where a CLEC's interconnection agreement does not require amendment – and allowed Verizon MA to enforce such agreements, the terms of which enable Verizon MA to cease providing delisted UNEs. *Procedural Order*, at 21-22. However, the Department improperly exempted from dismissal those CLECs that filed either responsive comments or a Letter of Intent to participate in this proceeding, even where no ICA amendment was necessary to implement federal law because their ICAs permitted Verizon to cease providing delisted UNEs upon written notice. Moreover, the Department appears to have prohibited Verizon MA from discontinuing access to delisted UNEs for this group of CLECs despite the terms of their ICAs. *Id*. at 23-26, 32-33. Verizon MA seeks relief from this portion of the Department's procedural ruling. As the Department otherwise made clear in the *Procedural Order*, this proceeding was not opened to interpret existing agreements, and it did not intend here to affect *existing* contract rights. This is, however, the unintended effect of the Department's ruling.

Under its ICAs with numerous CLECs, Verizon MA is entitled to implement various rulings issued by the FCC in the *Triennial Review Order* that are binding and legally effective today. These preemptive federal rulings, which were either upheld by the D.C. Circuit in *USTA II* or not challenged in the first place, include, *inter alia*, the elimination of unbundling requirements for OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks and virtually all call-related databases; and the determination that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-premises facilities are not subject to unbundling. By not giving effect to currently effective ICA provisions, the Department's ruling contradicts the FCC's directives in its *Triennial Review*

Order, as well as the *Interim Rules Order*, which emphasized the need for a "speedy transition" to implement changes in federal unbundling obligations. *Interim Rules Order*, at ¶ 22.

Moreover, the Department's *Procedural Order* appears to conflict with the Department's *Consolidated Order* in D.T.E. 03-60/04-74 – issued on the same day - which held that there is no "basis under state law, the GTE/BA Merger Order, or Section 271 [of the Telecommunications Act of 1996] upon which we could, at this time, require Verizon to continue provisioning UNEs delisted by USTA II." *Procedural Order*, at 32, citing *Consolidated Order*, D.T.E. 03-60/04-73, at 21-26, 46-48, 55-57, & 67. Despite the Department's decision to reject all grounds cited in CLEC standstill requests in D.T.E. 03-60/04-73, and its statement to do the same in D.T.E. 04-33 (*Id*. at 32), the Department's *Procedural Order* has the effect, in part, of a standstill order. This would be a clear violation of those ICAs that do not require amendment to implement preemptive federal rules. It is not within the Department's purview in this arbitration to interpret or alter the parties' rights and obligations under their existing interconnection agreements.

The *Procedural Order* is also internally inconsistent in that the Department initially refrained from interpreting Verizon MA's interconnection agreements unless an affected CLEC files a separate action to resolve a dispute over Verizon's contract interpretation. *Id*. at 22. However, the Department subsequently appears to require Verizon MA to continue providing delisted UNEs to CLECs that remain in the arbitration - even if their ICAs stated otherwise. *Id*. at 32.

Verizon MA provided the Department with substantial – and unrebutted - evidence detailing the terms of the ICAs, by individual CLEC, that specifically allow for Verizon MA to

implement the preemptive *TRO* rulings.[3] Should a CLEC dispute Verizon MA's implementation of an FCC or judicial ruling under an existing interconnection agreement, the affected CLEC may bring a complaint to the Department or other appropriate decision-maker for resolution.[4] Accordingly, the Department should grant the relief requested in this Motion by declaring that the *Procedural Order* does not preclude Verizon MA from enforcing the terms of its interconnection agreements as to any party to this proceeding.

I. ARGUMENT

The Department appears to require that Verizon MA continue to provide delisted UNEs to CLECs with ICAs that no longer require the continued provision of UNEs eliminated by federal law *if* the CLECs in question remain as parties to the arbitration. *Procedural Order*, at 32. This contravenes the clear terms of the ICAs with numerous CLECs, which are on file with the Department in their entirety - and which were submitted, in pertinent part, by Verizon MA in this arbitration. *See Supra* at 5 n. 3. Pursuant to the terms of those agreements, Verizon MA has already notified CLECs and discontinued provision of UNEs. The Department was informed of Verizon MA's action. *See Supra* at 2.

There is no basis for denying Verizon MA its contractual rights under existing ICAs. Accordingly, the Department should grant the relief requested and permit Verizon MA to enforce its interconnection agreements. By granting this Motion, the Department will establish that it did

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[3] *See* Attachment to Verizon MA's September 8, 2004, Letter Responding to CLEC Comments filed regarding its Notice of Withdrawal. The complete interconnection agreements are also on file with the Department.

[4] It should be noted that, despite Verizon's contract notification to CLECs regarding the treatment of delisted UNEs, none of the CLECs in question in Massachusetts have taken such recourse regarding Verizon MA's enforcement of the applicable contract terms.

not intend to turn back the clock to reinstate UNEs that were eliminated months ago in accordance with federal law and the terms of parties' ICAs.

A. The Department's *Procedural Order* Appears to Override Verizon MA's Existing Agreements with Certain CLECs By Reestablishing UNEs Eliminated Under Federal Law.

In its *Procedural Order*, the Department determined that Verizon MA – pursuant to the terms of its ICAs - may discontinue UNEs eliminated by the *Triennial Review Order* or *USTA II* decision as to those CLECs dismissed from this arbitration. *Procedural Order*, at 22. The Department specifically stated that

> … we express no view of Verizon's interpretation of its interconnection agreement with these CLECs. Nor do we preclude an affected CLEC from filing a separate action with the Department to resolve any dispute over Verizon's contract interpretation. Rather, we agree with Verizon that the best approach to resolve any dispute over Verizon's interpretation is to wait until an actual dispute about the effect of a change-of-law, if any arises.

Id. at 22. Although the Department declined to interpret the ICAs here,[5] the Department - later in that same order - appears to have prohibited Verizon MA from enforcing the same or similar contract terms in its agreements with CLECs that the Department determined could remain in the arbitration. *Id*. at 32. Nothing in the agreements permits such disparate treatment.

On the contrary, since the contract language is the same, the method for resolution of a dispute over interpretation of the change-of-law provision should be the same - the dispute

[5] Likewise, the Department stated that it "made no determination regarding Verizon's obligations pursuant to individual interconnection agreements with respect to enterprise switching and the four-line carve out rule" in "vacating the suspension of the tariff revisions." *Id.* at 33. Nevertheless, the Department's ruling requiring the provision of delisted UNEs has the unintended effect of interpreting the ICAs in a manner that would restrict Verizon MA's contractual rights to implement the *TRO* rulings.

resolution process,[6] not this arbitration. Given this inconsistency, the Department should grant Verizon MA relief by allowing it to enforce the terms of its ICAs as to all CLECs. It is clear from a review of the applicable contract language that Verizon MA may take certain actions under those ICAs where Verizon has been relieved of its legal obligation to provide certain UNEs under federal law.

As Verizon MA explained in its Notice of Withdrawal, this proceeding is intended to amend existing interconnection agreements, not to interpret them.[7] It would be inappropriate to attempt to interpret existing interconnection agreements outside the context of a concrete dispute between Verizon and a particular CLEC. Verizon MA has properly exercised its contractual rights and, upon notice, has repriced delisted UNEs to match similar service offerings. It would, therefore, be unreasonable for the Department in its *Procedural Order* to deprive Verizon MA of its rights under the existing ICAs by imposing unbundling requirements that were eliminated by the FCC over a year ago.

The Department's *Procedural Order* also appears to be inconsistent with the Department's ruling in D.T.E. 03-60/04-73 – that was issued on the same day - regarding

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6 Even the CLEC coalition represented by Swidler Berlin recognized that dispute resolution is the recourse available to parties under the terms of the ICAs for contract interpretation disputes. *See* CLEC Reply Letter at 1, filed August 31, 2004, in response to Verizon MA's Notice of Withdrawal.

7 As other state commissions have correctly observed – and as the Department did initially (*Id*. at 22) – there is no need to decide in the context of an arbitration whether Verizon's interpretation of its existing interconnection agreements is correct. Indeed, *all* state commissions that have ruled on Verizon's Notices of Dismissal have approved withdrawal of all or most parties designated by Verizon *but* have declined to interpret the contract language cited by Verizon as the reason for withdrawal. *See e.g.*, Order Allowing Verizon to Withdraw Its Petition, Docket No. UT-0430313, Order No. 12, at 23, 25 (Washington St. Util. & Trans. Comm'n. Nov. 19, 2004) ; Ruling Allowing Verizon to Withdraw Arbitration, Case Nos. 04-C-0314 & 04-C-0318, at 6 (N.Y. Pub. Serv. Comm'n Sept. 22, 2004); Notice of Proceeding and Prehearing Conference, Case No. 9023, at 3 (Md. Pub. Serv. Comm'n Sept. 3, 2004); Order Re: Verizon Motion of Withdrawal, Docket No. 6931, at 3-4 (Vt. Pub. Serv. Bd. Aug. 25, 2004); Second Procedural Arbitration Decision, Docket No. 3588, at 5 (R.I. Pub. Utils. Comm'n Aug. 18, 2004), affirmed by Order Reviewing Second Procedural Arbitration Decision, Docket No. 3588, at 3, 4-5 (R.I. Pub. Utils. Comm'n Nov. 19, 2004).

CLECs' standstill motions. Citing the *Consolidated Order* in D.T.E. 03-60/04-73, the Department found that there is no "basis under state law, the GTE/BA Merger Order, or Section 271 [of the Telecommunications Act of 1996] upon which we could, at this time, require Verizon to continue provisioning UNEs delisted by USTA II." *Procedural Order*, at 32, citing *Consolidated Order*, D.T.E. 03-60/04-73, at 21-26, 46-48, 55-57, & 67.

Although the Department in D.T.E. 03-60/04-73 correctly rejected all of the grounds articulated in the CLECs' request for a standstill order,[8] it appears that the Department (perhaps unintentionally) has, in effect, granted just such relief here by directing Verizon MA to maintain delisted UNEs not required by the FCC's *Interim Rules Order*. The Department's ruling appears to apply even if a CLEC that remains in the arbitration is governed by an ICA that permits Verizon MA to discontinue delisted UNEs without further amendment. *Procedural Order*, at 32.

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[8] The vast majority of state regulatory commissions have also denied CLEC requests for standstill orders. *See e.g.*, Administrative Law Judge's Ruling Denying Motion, R.95-04-043, I.95-04-044, at 7 (Cal. Pub. Utils. Comm'n June 25, 2004); Order on Motions to Hold in Abeyance, Docket No. 040156-TP, Order No. PSC-04-0578-PCO-TP, at 6 (Fla. Pub. Serv. Comm'n June 8, 2004); Order Dismissing Petition, Docket No. 18889-U (Ga. Pub. Serv. Comm'n June 1, 2004); Minutes from Open Session, at 4 (La. Pub. Serv. Comm'n June 9, 2004); Letter Ruling, DTE 03-60 (Mass. Dep't Telecomms. & Energy June 15, 2004); Letter Ruling, DT 04-107 (N.H. Pub. Utils. Comm'n June 11, 2004); Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance, Cases 04-C-0314 & 04-C-0318, at 7-8 (N.Y. Pub. Serv. Comm'n June 9, 2004); Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-2 (N.C. Utils. Comm'n June 11, 2004); Order Denying Petition for Clarification, ARB 531, at 6 (Or. Pub. Utils. Comm'n June 30, 2004); Open Meeting of Commission (S.C. Pub. Serv. Comm'n June 22, 2004); Transcript of Authority Conference, Docket No. 04-00158, at 34-35 (Tenn. Reg. Auth. June 7, 2004); Order Denying Joint CLEC Motion, Docket No. 03-999-04, at 2-3 (Utah Pub. Serv. Comm'n June 14, 2004); Order Re: Motion to Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 2-3 (Vt. Pub. Serv. Bd. May 26, 2004); Order, Case No. PUC-2204-00073 and Case No. PUC 2204-00074 (Va. State Corp. Comm'n July 19, 2004).

In addition, other state commissions have lifted standstill orders on the ground that they negate the ILEC's contractual rights provided under the interconnections agreements by preserving UNEs that have been eliminated under federal law. *See e.g.*, Letter Ruling on Reconsideration, Case No. 9026 (Md. Pub. Serv. Comm'n Oct. 15, 2004); Order No. 13360, Formal Case No. 1029, at 3-4 (D.C. Pub. Serv. Comm'n Aug. 19, 2004) (in which the District of Columbia Commission held that continuing a preliminary injunction would deprive Verizon of a contractual right to cease providing UNEs, and thereby change the *status quo*, rather than maintain it); Entry on Rehearing, Case Nos. 03-2040-TP-COI *et al.*, ¶ 15 (Ohio Pub. Utils. Comm'n July 28, 2004) (in which the Ohio Commission clarified that its earlier order purporting to forbid Verizon Ohio from discontinuing or repricing UNEs without a contract amendment was not intended to override the terms of existing interconnection agreements that already permitted discontinuation of UNEs upon notice).

Moreover, this ruling appears to encompass delisted UNEs that are not covered by the FCC's *Interim Rules Order* and that Verizon MA has already discontinued providing at UNE rates, as expressly authorized by the applicable ICAs. Any such ruling would unlawfully abrogate Verizon MA's contractual rights under the terms of ICAs that provide for the elimination of delisted UNEs with notice. Verizon MA believes this overbroad sweep was unintended. Therefore, the Department should grant this Motion, stating that its *Procedural Order* was not intended to overturn existing ICAs.

B. The Department's *Procedural Order* Contradicts the FCC's Directives in its *Triennial Review Order* and *Interim Rules Order*.

In its *Procedural Order*, the Department found that while the FCC's *Interim Rules Order* is in effect, "Verizon is obligated to continue provisioning delisted UNEs, and thus, a standstill order by the Department regarding UNEs provided under parties' interconnection agreements is unnecessary at this time." *Procedural Order*, at 32. For the UNEs covered by the *Interim Rules Order*, that ruling is unexceptionable - and Verizon MA does not question it. The Department went on, however, to state that

> [f]or delisted UNEs not addressed by the Interim Rules Order, (e.g., enterprise switching including the four-line carve out), we note that Verizon is prohibited from discontinuing those UNEs to carriers in Exhibit B of the Withdrawal Notice, or to any other carrier the Department permits to participate further in this proceeding, pending a Department ruling in this proceeding on Verizon's rights and responsibilities.

Id. at 32-33. This ruling appears to contradict both the FCC's *Interim Rules Order* and those ICAs that expressly permit the discontinuation of delisted UNEs.

In the *Interim Rules Order*, the FCC imposed "transitional" unbundling obligations only with respect to those UNEs affected by the *USTA II* mandate - *i.e.*, mass market switching, high capacity loops, and dedicated transport. Specifically, incumbent local exchange carriers

("ILECs") must provide these items under the rates, terms, and conditions that applied under their interconnection agreements as of June 15, 2004. This obligation will continue until the earlier of the effective date of final unbundling rules or six months after Federal Register publication of the *Interim Rules Order*. *Interim Rules Order,* at ¶ 1.

The Department recognizes in its *Procedural Order*, that "the [FCC's] Interim Rules Order requires Verizon MA to continue to provide delisted UNEs for six months under the rates, terms and conditions in interconnection agreements as of June 15, 2004, a fact that Verizon acknowledges."[9] *Procedural Order*, at 22 n.25. Those "transitional" unbundling obligations imposed by the *Interim Rules Order*, however, apply only to the UNEs eliminated by the *USTA II* mandate, and do not affect any of the *TRO* rulings that were either affirmed in *USTA II* or were not challenged on appeal. The numerous rulings issued by the FCC in its *Triennial Review Order* are binding and legally effective today.[10] Thus, the FCC's *Interim Rules Order* provides no legitimate basis for the Department to prohibit Verizon MA from enforcing its contractual rights to discontinue access to UNEs delisted under the *TRO* rulings.

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[9] The FCC's *Interim Rules Order*, which maintained, on an interim basis, the contract rates, terms and conditions that applied as of June 15, 2004, only for mass market switching, high capacity loops and dedicated transport , applies to *all* CLECs with an interconnection agreement in effect as of June 15, 2004, regardless of whether the CLEC remains a party to this arbitration. *Interim Rules Order,* at ¶ 1.

[10] As previously stated, these preemptive federal rulings, which were either upheld by the D.C. Circuit or not challenged in the first place, include, among others, the elimination of unbundling requirements for OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks and virtually all call-related databases; and the determination that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-premises facilities are not subject to unbundling.

II. CONCLUSION

For the reasons discussed above, the Department should grant Verizon MA's Motion by declaring that the *Procedural Order* does not preclude Verizon MA from enforcing the terms of ICAs as to any party to this proceeding.

Respectfully submitted,

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